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Supreme Court of the United States.

October Term, 1900.

AUGUST STREITWOLF, *Plaintiff in Error,* v. ELIZABETH STREITWOLF, *Defendant in Error.*	In Error to the Court of Errors and Appeals of New Jersey.

BRIEF OF ALAN H. STRONG,

For Defendant in Error.

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The original bill in the Court of Chancery of New Jersey was filed by Elizabeth Streitwolf against August Streitwolf, her husband, for a divorce from bed and board.

Down to that time there is no question that both were domiciled at New Brunswick, New Jersey, where they had been married and had lived together nearly twenty years, where the husband owned considerable real estate and was established in the liquor business.

During the pendency of that suit the husband went, in May, 1897, to Mandan, North Dakota, and on August 9th, precisely three months from the day he first reached there, began a suit for absolute divorce in a District Court of that State, alleging in his complaint, as an inducement to that Court to assume jurisdiction of the cause, that he then was and for more than

ninety days immediately preceding the commencement of said action had been a resident in good faith of said State.

Copies of Summons and Complaint in said action were served on the wife at New Brunswick, New Jersey, where she had continued to reside, and thereupon she applied to the Court of Chancery by petition in the original cause for an injunction to restrain the prosecution of said suit in North Dakota.

An injunction was granted as prayed and service was made upon the attorneys of the husband in the North Dakota action and also upon his solicitor in the New Jersey suit in which the injunction was issued. Service upon the husband could not be made.

The suit in North Dakota, nevertheless, was proceeded with and decree entered therein, for an absolute divorce was granted to August Streitwolf on the seventh day of October, A. D. 1897, from the said Elizabeth his wife, she not having appeared nor being in any way subject to the jurisdiction of the Court.

A supplemental bill was then filed by the wife on January 11, 1898, charging that said August Streitwolf was not at the time of commencing his said suit or at any other time a resident in good faith of North Dakota, but that his pretended residence in that State at any time was wholly fictitious and fraudulent and designed only to give colorable jurisdiction to said Court for the purpose of said action, and praying that the decree or judgment so obtained by him in said District Court of North Dakota might be set aside, etc.

After hearing, a final decree was made on said supplemental bill November 18, 1898, reciting that it appeared that said judgment or decree in said District Court of North Dakota had been obtained by fraud and imposition upon said District Court and that said August Streitwolf was not at the time of commencing said suit or at any time prior thereto a resident in good faith of said State of North Dakota, and that said Court had no jurisdiction of said Elizabeth Steritwolf in said cause, and it was therefore decreed that said judgment or decree of said District Court is wholly void and of no effect, etc.

Said decree of the Court of Chancery of New Jersey declaring void the decree of the District Court of North Dakota,

having been duly affirmed upon appeal in the Court of Errors and Appeals of New Jersey, this writ of error is prosecuted to reverse said decree of affirmance.

I.

The Court of Chancery of New Jersey and the Court of Errors and Appeals on appeal might properly declare void the North Dakota decree if there was either lack of jurisdiction or fraud in its procurement.

"It is settled that notwithstanding the provision of the Con-"stitution of the United States, which declares that 'full faith "and credit shall be given in each State to the public acts, rec-"ords and judicial proceedings of every other State' (Art. IV, "Sec. 1), and the Act of Congress passed in pursuance thereof "(1 Stat. 22; Rev. Stat. parg. 905), and notwithstanding the "averments in the record of the judgment itself, the jurisdic-"tion of the court by which a judgment is rendered in any "State may be questioned in a collateral proceeding; that the "jurisdiction of a foreign court over the person or the subject "matter, embraced in the judgment or decree of such court, "is always open to inquiry; that in this respect a court of an-"other State is to be regarded as a foreign court; and that a "personal judgment is without validity if rendered by a State "Court in an action upon a money demand against a non-resi-"dent of the State, upon whom no personal service of a process "within the State was made, and who did not appear. D'Arcy "v. Ketchum, 52 U. S. 11 How. 165; Thompson v. Whitman, "85 U. S. 18 Wall. 457; Hall v. Lanning, 91 U. S. 160; Penn-"oyer v. Neff, 95 U. S. 714."

The above is quoted from the opinion of this Court in Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287. Also see Simmons v. Saul, 138 U. S. 439.

In Grover v. Baker Sewing Machine C. v. Radcliffe, 137 U. S. 187, it was held competent in a suit on a judgment of

another State to set up that the defendant was not domiciled in such State, that being material to the jurisdiction. No reason is perceived why the domicile of the plaintiff where jurisdictional may not equally be inquired into.

The question of "residence" (domicile) is not concluded by the recitals in the North Dakota decree.

2 Black on Judgments, Section 930.
1 Freeman on Judgments, Section 580.
Reed v. Reed, 51 Mich. 117.

Such recital is only conclusive when defendant has been regularly served with process within the State where the decree is rendered, or has appeared as in Fairchild v. Fairchild, 8 Dickinson, 679, and in each of the cases there cited, namely, Kirrigan v. Kirrigan, 2McCarter, 147; Nichols v. Nichols, 10 C. E. G. 63; Kinnier v. Kinnier, 45 N. Y. 540.

Where the Court has jurisdiction of the subject of divorce generally and of the person, it may be that the finding of residence is conclusive as the adjudication of any other material fact would be under such circumstances. (See In re Ellis Estate, 55 Minn. 401; Brick v. Brick, 65 Mich. 230.)

But where there is no regular service of process nor any appearance, the question of complainant's residence (always meaning *domicile*) is one that enters into the question of jurisdiction of the person of the defendant. In such cases (adopting the most advanced contention in support of the decree) it is the fact of the complainant's residence alone which enables the Court to dispense with service of process within its jurisdiction and proceed upon a substituted or foreign service.

Domicile of the complainant within the jurisdiction is a condition to the validity of service made out of the jurisdiction, hence the question of domicile must be open to inquiry when the decree dependent upon such service is used in another State, notwithstanding any recital contained there.

To quote from the opinion in Thompson v. Whitman, 18 Wal. 157 (Justice Bradley): "But if it is once conceded that "the validity of a judgment may be attacked collaterally by "evidence showing that the Court had no jurisdiction, it is not

"perceived how any allegation contained in the record itself, "however strongly made, can affect the right so to question it. "The very object of the evidence is to invalidate the paper as a "record. If that can be successfully done, no statements con- "tained therein have any force. If any such statements could "be used to prevent inquiry, a slight form of words might al- "ways be adopted so as effectually to nullify the right to such "inquiry. Recitals of this kind must be regarded like assevera- "tions of good faith in a deed, which avail nothing if the in- "strument is shown to be fraudulent."

The right to impeach the judgment of a Court of another State by bill in equity for fraud is expressly declared in Cole v. Cunningham, 133 U. S. 107.

Although fraud cannot be set up by plea or as a defense to an action on the judgment.

Christmas v. Russell, 72 U. S. 290.

II.

This Court cannot review the finding of the State Court on the question of fraud or lack of jurisdiction.

It is found as a fact in the opinion of the Vice Chancellor, on page 125 of the record, "that there was no bona fide domicile "in North Dakota and that the obtaining of a divorce on the "ground of domicile was a fraud on the Court"; and in the decree on page 126 of the record there is a similar finding recited.

The opinion of the Vice Chancellor was adopted in the Court of Errors and Appeals (the decree being affirmed on the opinion below). The findings of the Court of Chancery are thus made the findings of the Court of Errors and Appeals.

On error to a State Court this Court cannot reëxamine the evidence, and when the facts are found below is concluded by such finding.

Dower v. Richards, 151 U. S. 658.

And this is the rule where the record brought up is a decree in chancery as well as where it is a judgment at law.

Egan v. Hart, 165 U. S. 188.

The only permissible inquiry into the facts is to ascertain *whether there is any evidence to support the conclusion of the State Court.*

For that purpose and for that purpose only it is proposed to recapitulate the evidence touching the alleged residence of Streitwolf in North Dakota.

He had spent his entire married life, about twenty years, in New Brunswick, New Jersey, and claims to have voted there at the Presidential election in November, 1896.

November 16, 1896, his wife having left him and filed the original bill in this cause for divorce from bed and board, on the ground of cruelty, in August previous, he took up his residence he says in New York. In his answer he merely says that he engaged rooms there, which probably he considers equivalent to residence. It appears that he took his meals at Stroh's restaurant.

He had rented his house in New Brunswick, furnished, together with his liquor store.

January 1st, 1897, he went abroad and was absent until late in March following, when he returned to his boarding house in New York, where he remained until the 6th of May.

On that date he left (as he now says) for Mandan, North Dakota, but telling Stroh, the restaurant keeper, that he "expected to go to the Yellowstone Park with a party of gentlemen and from there take a trip to Europe." To others he simply told that he was going west. He told Hoggatt and Caruthers, afterward his attorneys in his divorce suit, that he was going to Mandan, but he made known to no one at that time that he intended to change his residence or go to Mandan to live.

On inquiring at his boarding house on the seventh day of May, his son (who was on friendly terms with him although living with complainant) was informed that he had gone to Chicago.

On the 19th of June he wrote to his son from Mammoth Hot Springs, Yellowstone Park, that he was "enjoying a lengthy trip through the Park," etc.

On the 20th of July he was back in New York and wrote his son to meet him.

About the 30th of July he again disappeared from New York as mysteriously as before, giving his son to understand that he was going to Europe to look after an estate recently left him by an aunt in Germany.

On August 14th his son received a letter from him mailed at Mandan August 11th, in which he seems to admit deception and concealment, or at all events strangeness in his conduct, and says "there is no more trouble about sending your letters direct here."

From this letter the son obtained his first information that his father had been at any time in Mandan, or North Dakota. Three days later (on August 17) the summons and complaint in the Dakota suit were served on Mrs. Streitwolf in Jersey City.

On August 19th (two days after service of these papers) answer was filed to the original bill.

Streitwolf says that he formed the determination to make his residence in North Dakota about the time that the negotiations with his wife for separate maintenance came to an end, which was the latter part of April. His counsel desired the Vice Chancellor to assume that the breaking off of these negotiations might have furnished a very powerful motive for his going to Mandan.

During the week last preceding his departure he said to his son, representing his wife, "You will not settle; you will suffer."

Before he went he had made the acquaintance of Hoggatt & Caruthers, who kept a standing advertisement over their name in the New York Herald, "Dakota Divorces—An absolute divorce may be obtained in North Dakota upon a residence of 90 days."

The purpose of obtaining a divorce in North Dakota had entered his mind before he went there. He knew that Hoggatt & Caruthers had an office in Mandan, as well as in New York.

He told them (and them only) that he was going to Mandan, and almost the first person he was introduced to by his traveling companion, on the very day he reached Mandan, was Voss, the Mandan correspondent of Hoggatt & Caruthers, and whose name appears with theirs as his attorneys in the North Dakota decree.

Prior to May, 1897, he had never been in North Dakota, had no friends there, had never corresponded with anyone there; yet he left New York with the determination he says not only of making his residence in North Dakota, but of making it at Mandan; bought his ticket in New York for Mandan and went directly there.

Asked what there was about Mandan that was so attractive to him he said: "In the first place the country generally is considered very healthy for people who suffer from nervousness; and in the second place I went down *for the purpose of getting my citizenship.*" And the reason he went to Mandan in preference to any other part of the State was because a chance acquaintance whom he first met a few days before he started, happened to be going there.

Thus were his steps directed to the very spot where the Dakota end of the Hoggatt & Caruthers divorce mill was in full and active operation. The divorce business was a "sort of fad" there, to use the expression of Voss, and every stranger presumptively a divorcee.

His first reason for going to North Dakota, its healthfulness, doesn't seem to have been sufficient to prevent his spending a very large part of the time of his alleged residence elsewhere; and within a very few days after he obtained his decree he went to Minneapolis and thence he went to New York and from there to Europe for his health. His health required him to go to Mandan, but no sooner had he got his decree than his health required him to leave. He only returned to this country in March following in consequence of the notice of this suit which he received in Austria. Three or four weeks later (after filing his answer) he returned to Mandan, doubtless advised that this was the only way by which he could hope to render his claim of residence in Mandan at all plausible. The bill charged that he returned to New York within a week after the

decree and had finally abandoned his pretense of residing in North Dakota immediately upon the accomplishment of the object which had induced him to assume it; and that he had never since (up to the filing of the bill in January, 1898) returned to said State. It was absolutely necessary that he should return to Mandan in order that the charge so made in the bill might not stand practically confessed. But evidence made by a party in his own favor after issue joined is of no weight. So also as to his ostentatious participation in politics and his pretense of going into business. These are the things that would naturally occur to him as the most obvious and notorious means of stimulating a residence.

The second reason for going to Mandan was "for the purpose of getting my citizenship."

In case of most persons changing their residence in good faith to another State, the change of domicile or citizenship is only incidental, but with Streitwolf it was the object and not the incident. For some reason it was desirable that he should have a citizenship there. Why was it? He does not explain, but the conclusion is irresistable that it was solely for the purpose of his suit for divorce, which he brought (November 9, 1897) the very next day after the expiration of the statutory period of ninety days from the time of his first setting foot in Mandan.

It surely cannot be said that in this evidence there is no support for the finding that Streitwolf had no *bona fide* domicil in North Dakota.

That he went there solely for the purpose of getting a divorce is too obvious for argument.

It would indeed be remarkable if this Court should find reason, not merely to disagree with the conclusion of fact reached by the learned Vice Chancellor and unanimously affirmed by the twelve Judges sitting in the Court of Errors and Appeals, but *to say that there is nothing in the evidence from which such a conclusion can be drawn.*

Evidence of a similar character but on the whole less convincing was held sufficient to sustain a verdict of guilty upon

an indictment involving a like issue in Commonwealth v. Kendall, 162 Mass. 221.

In Dickinson v. Dickinson, 167 Mass. 474, the Court said: "It has often been held by this Court that the fact that a man "abandons his wife and goes into another State and there ap- "plies for a divorce soon after he is able to do so warrants the "inference that he goes there for that purpose. Lyon v. Lyon, "2 Gray, 367; Chase v. Chase, 6 Gray, 157, 162. In Smith v. "Smith, 13 Gray, 209, the presumption arising from such a "fact is said by Chief Justice Shaw to be 'violent if not con- "'clusive.' See also Sewall v. Sewall, 122 Mass. 156."

The plaintiff must have had an actual domicil within the State where the action is brought for divorce.

The domicil must be complete and full in distinction to a quasi domicil. It must be adequate for any purpose.

2 Bishop Mar. Div. & Sep. Section 97.

This is the rule established in Lemesurier v. Lemesurier, 11 Reports (Privy Council) p. 517 (1895) after a full examination of the English cases.

There must be a fixed abode with an intention to remain at least for a time, for business or other reasons not solely connected with bringing suit for divorce.

1 Nelson Divorce and Separation, Section 41.

It has lately been held in the very State of North Dakota itself, that the courts of that State have no jurisdiction to grant a divorce to one who *"has no honest purpose of establishing a "domicile and cherishes the purpose of quitting the State as "soon as the divorce case is decided."*

Smith v. Smith (N. Dak.) 75 N. W. Reporter, 783.
2 Black Judgments, Section 929.
Cadwalader v. Howell, 3 Har. (N. J.) 138.
Winship v. Winship, 1 C. E. G. 107.

Coddington v. Coddington, 5 C. E. G. 163.
Firth v. Firth, 5 Dick. 137.
Fosdick v. Fosdick, 15 R. I.

The evidence of change of domicile must be free from suspicion and the statement of the party as to his intention is not sufficient unless some reasonable motive is disclosed unconnected with procuring a divorce.

1 Nelson Div. and Separation, Section 43.

III.

The North Dakota decree would not be within the protection of the Federal Constitution or statute even if the husband had been domiciled in good faith in that State.

The wife was never served with process in North Dakota (in fact was never in the State), nor did she appear in the cause. Service was made upon her in New Jersey. Her domicile continued to be in New Jersey, and was not affected by any change of the husband's domicile after they had separated.

A wife may acquire a separate domicile by her own act.

Cheever v. Wilson, 9 Wal. 108.

A fortiori may she simply retain the domicile which she has always had from childhood and through all the period of their cohabitation as against any act of removal by the husband after they had separated.

Moreover the legal presumption that the domicile of the husband is the domicile of the wife, is expressly excluded by a statute of North Dakota (pleaded in the answer to the supplemental bill), declaring that such presumption "does not apply "After separation each party may have a separate domicile de- "pending for proof upon actual residence and not upon legal "presumptions." (Record, p. 28.)

It is clear therefore that in the eye of the statute law of

North Dakota, as well as of the general law, Elizabeth Streitwolf was never domiciled in that State. The plaintiff's affidavit filed in his suit sets forth the undisputed fact that the wife was not a resident of North Dakota. (Record, p. 37.)

Granting then for the present that the husband's domicile was changed in 1897 to North Dakota, it being entirely clear that the wife's domicile continued to be in New Jersey, the question is neatly presented whether the Constitution or Statute of the United States requires that faith and credit be given by the Courts of New Jersey to a decree rendered by a court of North Dakota between parties so domiciled without appearance by the non-resident defendant and upon service of process made out of the jurisdiction of North Dakota.

It is not to be denied that this is a question upon which the courts of this country have differed irreconcilably, and which is hardly to be decided upon mere authority.

It is worthy of notice however, that the States which have held that such a judgment is not entitled to extraterritorial regard as of right on principles of international law include most of those to which the profession most frequently and confidently resorts for sound expositions of common law, and that this is also the doctrine of the English courts. The States so holding are New York, New Jersey, Pennsylvania, North Carolina South Carolina and Wisconsin. Massachusetts has not yet spoken, the cases in that State having rested on the legal fiction that the wife's domicile is necessarily the same as her husband's except where it appears affirmatively that she has left him for good cause. Burlew v. Shannon, 115 Mass.; Loker v. Gerald, 157 Mass. 42, 45; Burtis v. Burtis, 161 Mass. 508.)

And where as in the present case the offense charged against the wife occurred, if at all, when both parties were domiciled in another State, by the laws of which the offense was not a cause of absolute divorce, both Massachusetts and New Hampshire hold that the courts of a State to which the husband subsequently transfers his domicile cannot acquire jurisdiction to grant a divorce for such cause.

Lyon v. Lyon, 2 Gray, 367.
Greenlaw v. Greenlaw, 12 N. H. 200.
Foss v. Foss, 58 N. H. 283.

There has been no decision by this Court holding that decrees of divorce granted in a State where the complainant is domiciled but without regular service of process upon or appearance by defendant domiciled elsewhere, are within the provisions of the Federal Constitution and statute. Cheever v. Wilson, 9 Wal. 108, merely decides that a finding of residence is at least *prima facie* sufficient (there having been an appearance and defense on the merits). What was said in Pennoyer v. Neff, 95 U. S. 714, was intended merely to "prevent a misapplication of the views expressed," and to leave the question open as not then involved. The reference to divorce proceedings was wholly aside from the case in hand, and was at best a dictum. Moreover, the Court in that case was not considering the scope of the "full faith and credit" clause, but of the clause requiring "due process of law." A decree of divorce without strict service of process may be due process of law and so capable of recognition by comity (See Doughty v. Doughty, 1 Stewart, 581, 586), and yet not be entitled as of right to such recognition under the compulsion of the Constitution. It is a widely different thing to say that it may be recognized from saying that it must be. And indeed all that was said or intimated in Pennoyer v. Neff was that in such a case as this a judgment might perhaps be rendered *"which would be binding within the State,"* a proposition which we are not concerned to dispute.

The expressions in Cheely v. Clayton, 110 U. S. 701, refer only to cases where the domicile of the wife is either actually or constructively the same as that of the husband, and all that is there decided is that in order that the decree shall be valid even in the State where granted, where the service was only by publication, it must have been such as was required by the law of the State where the decree was granted.

The subject therefore is open to discussion and consideration in this Court upon principle; and I understand the inquiry

to be, *what faith and credit is such a judgment entitled to receive extraterritorially, upon general principles of international law?*

For if the judgment is of a nature to operate only in the jurisdiction where it was rendered it cannot be that the Constitution and Statute of the United States can apply so as to alter its essential character and make it operate elsewhere.

For instance, administration is only operative within the State where granted (Vaughan v. Northrup, 15 Peters, 1; Noonan v. Bradley, 9 Wal. 394), and it seems never to have been suggested that its operation is extended by the Constitution or Act of Congress now in question.

The case of Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287, clearly recognizes, and cites numerous cases to show, that a judgment valid in one State under its local laws, need not necessarily be recognized in other States.

It is well settled that in matters of divorce there is such a distinction to be drawn and that a decree may be operative in the territorial jurisdiction where it was pronounced without being entitled to any consideration whatever in another jurisdiction.

Said Lord Westbury in Shaw v. Gould, L. R. 3 H. L. 55, 81: "It is perfectly competent to the courts of Scotland to fix a "certain amount of residence as the condition for the exercise "of its jurisdiction, and if that condition be fulfilled it may pro- "ceed to pronounce a judgment that will be binding within its "own borders; but that judgment cannot claim extraterritorial "authority unless it be pronounced in accordance with rules of "international public law."

In Lemesurier v. Lemesurier, Appeal Cases (1895), 517, 527, Lord Watson, delivering the opinion of the Court, said:

"In order to sustain the competency of the present suit it is "necessary for the appellant to show that the jurisdiction as- "sumed by the district Judge of Matara was derived either "from some recognized principle of the general law of nations "or from some domestic rule of the Roman-Dutch law. If

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in actions
strictly penal
Wisconsin v.
Pelican Ins. Co.
127 U.S. 265;
Huntington v.
Attrill 146
U.S. 657.

"either of these points were established the jurisdiction of the "district court would be placed beyond question; but the effect "of its decree divorcing the spouses would not in each case be "the same. *When the jurisdiction of the court is exercised ac- "cording to the rules of international law, as in the case where "the parties have their domicile within its forum, its decree "dissolving their marriage ought to be respected by the tri- "bunals of every civilized country.* The opinions expressed by "the English Common Lay judges in Lolley's case gave rise to "a doubt whether that principle was in consistency with the "law of England which at that time did not allow a marriage "to be judicially dissolved. That doubt has since been dis- "pelled; and the law of England was in their Lordships' opin- "ion correctly stated by Lord Westbury in Shaw v. Gould, 3 "Eng & Ir. App. 55, 85, in these terms: 'The position that the " 'tribunal of a foreign country having jurisdiction to dissolve " 'the marriages of its own subjects is competent to pronounce " 'a similar decree between English subjects who were married " 'in England but who before and at the time of the suit are " 'permanently domiciled within the jurisdiction of such for- " 'eign tribunal, such decree being made in a *bona fide* suit " 'without collusion or concert, is a position consistent with " 'the resolution commonly cited as the resolution of the judges " 'in Lolley's case.' *On the other hand a decree of divorce* a " vinculo *pronounced by a court whose jurisdiction is solely* " *derived from some rule of municipal law peculiar to its fo-* " *rum, cannot when it trenches upon the interests of any other "country to whose tribunals the spouses are amenable, claim "extraterritorial authority."*

After an elaborate examination of all the English cases on the subject the opinion in Lemesuier v. Lemusier concludes (p. 540): "Their Lordships have in these circumstances and upon "these considerations come to the conclusion that according to "international law *the domicile for the time being of the mar- "ried pair* affords the only true test of jurisdiction to dissolve "their marriage. They concur without reservation in the "views expressed by Lord Penzance in Wilson v. Wilson, L. "R. 2, P. & D. 435, which were obviously intended to refer, "not to questions arising in regard to the mutual rights of mar-

"ried persons, but to jurisdiction in the matter of divorce. 'It
" 'is the strong inclination of my own opinion that the only fair
" 'and satisfactory rule to adopt on this matter of jurisdiction
" 'is to insist upon the parties in all cases referring their mat-
" 'rimonial differences to the courts of the country in which
" 'they are domiciled. Different communities have different
" 'views and laws respecting matrimonial obligations and a dif-
" 'ferent estimate of the causes which should justify divorce.
" 'It is both just and reasonable therefore that the differences
" 'of married people should be adjusted in accordance with the
" 'laws of the community to which they belong and dealt with
" 'by the tribunals which alone can administer those laws. An
" 'honest adherence to this principle moreover will preclude the
" 'scandal which arises when a man and woman are held to be
" 'man and wife in one country and strangers in another.' "

See also Dicey Conflict of Laws, p. 270.

Also per Brett L. J. in Niboyet v. Niboyet, 4 P. & D. 1, 13, 14.

Where both parties have the same domicile no doubt the sovereignty, which has thus the sole and entire control of the status between them, may dissolve it, and such action should everywhere be regarded as conclusive.

It is not essential except as made so by the State constitutions, that divorce should be by judicial proceeding.

It is familiar that until within comparatively recent times divorces were always by the legislature.

Such divorces were valid at common law even without notice of any kind to the parties.

Maynard v. Hill, 125 U. S. 190.

Whether the proceeding is legislative or judicial, it is (on principles of international law) everywhere recognized as the declaration of the only sovereignty having any right to control the status of the parties; and this because they are its citizens.

It is the authoritative and conclusive determination of their relation to each other and to society, by the sovereignty to the

laws of which they have chosen to submit the regulation of their home.

But when the parties have diverse domiciles the aspect of the matter is entirely different.

Each State in which one of the parties is domiciled is interested in and has the right to regulate, control and dissolve the *status* of each of its citizens for its own local and domestic purposes; but neither State in virtue of any control of the *status* of its own citizen can affect the *status* of one not its citizen except for its local and domestic purposes and within its own territory.

The claim of either State to determine the *status* under such conditions cannot be asserted in terms which do not imply an equal right in the other State.

The right of the State of North Dakota to declare these parties divorced is no greater than the right of the State of New Jersey to declare them still married.

Any effort to apply in New Jersey the declaration of the sovereignty of North Dakota that they are no longer man and wife must fail because it conflicts with the right of the sovereignty of New Jersey to declare for its local purposes that they continue to be man and wife.

So axiomatic are these principles that it is not believed that they would be disputed by any one in case of a divorce by act of the legislature.

Maynard v. Hill, 125 U. S. 190, it is true involved the validity of a legislative divorce granted by the Territory of Oregon in which the husband was domiciled but not the wife. This Court held "that the granting of divorces was a rightful subject of legislation according to the prevailing judicial opinion of the country at the time when the organic Act of Oregon was passed by Congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature," and the husband being a resident within the territory, if the legislature possessed the power to grant a divorce in any case, its jurisdiction to legislate upon his *status* was undoubted.

But that case arose in Washington Territory and involved the title to lands in that part of Washington Territory which

was formerly part of the Territory of Oregon. The question was therefore in substance as to the effect of such a divorce in the State or Territory where it was granted and where the husband was domiciled. If the land in controversy had been in the State of the wife's domicile I apprehend the decision would have been otherwise. Clearly the courts of the State of her domicile were on no principle of international law required to consider her *status* as fixed by the legislation of another State to the jurisdiction of which she was never subject.

But, the supporters of such a decree will say, that this was a judicial proceeding, and therefore by force of the Constitution and Statute of the United States entitled to faith and credit as such as well in New Jersey as in North Dakota. And then confronted with the repeated decisions of this Court that judgments *in personam* rendered without appearance and without service of process within the territorial jurisdiction are entirely void, they return to the theory of *status* as a ground for sustaining the decree, urging that because it "affects" the *status* it is a proceeding *quasi in rem.*

But as a proceeding *quasi in rem* it is no better than if it were a legislative divorce.

Its irremedial defect is *the want of complete and exclusive control of the status—the res.*

Whether the power of the State of North Dakota shall be exerted through its legislature or its judiciary is a matter of concern only to itself; it is no greater in one case than the other, and in either case it cannot be more extensive than the control of the subject matter, unless the defendant appears or is subjected to the jurisdiction by service of process as in a cause *in personam.*

The analogy to a proceeding *in rem* fails at this vital point.

Complete and exclusive possession of the *res* is of the essence of the jurisdiction *in rem.*

It is not enough that the divorce proceeding affects the status; it must emanate from an authority which can control it; otherwise its effect must be merely local.

The *res* in divorce proceedings is the marriage relation; the *status is the joint status of two persons, not of one.*

As a proceeding *in rem* or *quasi in rem* it must deal with the *res* as an entirety, not with regard to the right of one party only.

There cannot be a husband without a wife or a wife without a husband. That which dissolves the marriage tie as to one dissolves it as to the other. Each is interested in the *status* in precisely the same way; the rights of neither party are incidental to those of the other; the rights of each are primary and of equal importance.

But each party takes the joint *status* with him or her into the country of his or her domicile, and by his or her citizenship subjects it to the laws of that country.

Hence where the parties are domiciled in different States there can be no proceeding analogous to a proceeding in rem in either State.

This results not from any technical or arbitrary view of the subject, but from the very nature of the thing, neither State having a right to control or dispose of the *res* to the prejudice or exclusion of an equal right in the other.

Since it must be admitted that each State before the divorce had the right to fix and regulate from time to time the *status* of its own citizen within its own jurisdiction, how is it possible that the mere exercise of this right by one State can wholly deprive the other State of its right (unless where by reason of the defendant having been subjected to the jurisdiction by due service of process or by voluntary appearance, there are present the essentials of a decree *in personam*)?

It is said that the non-resident spouse loses his or her partner as the necessary result of a divorce granted to the latter in the State of his or her domicile. This is satisfactory if such effect is confined to the territorial jurisdiction in which the divorce is granted; but entirely unsatisfactory if it is extended further.

If it is said that unless the divorce is recognized extraterritorially the parties will be regarded as divorced in one jurisdiction and as still man and wife in another, that is for the consideration of the State which assumes to grant a divorce under such conditions, but is no reason why such a divorce

should have more than its legitimate effect, or why the State of the domicile of the other party should by such usurpation be deprived of any of its just powers or should neglect the duty which it owes to its own citizen of protection against such a wrong.

If it were true that a person cannot be divorced in one State and still married in another it would be a ground for holding that neither State could grant a divorce without service of process within its territory, but certainly no reason for holding a divorce granted without such service to be binding everywhere.

To restate what I conceive to be the true doctrine on this subject, I submit the following propositions:

(1) Domicile of one party in the State is necessary and is sufficient to enable a court of that State to take jurisdiction in divorce.

(2) If process in such a case be served within the State or the defendant appear the judgment that follows is as a judgment *in personam*, entitled to full fait hand credit in every other State.

(3) If process in such a case be not served within the State and the defendant does not appear the court may enter a judgment which will fix the *status* within the State only.

(4) If both parties have their domicile within the State, the authorities of that State have complete and exclusive control of the *status* and can grant a divorce which will be valid everywhere.

In accordance with the views above expressed it was held in Doughty v. Doughty, 1 Stewart (N. J.) 581, that a decree of divorce obtained without appearance by defendant and upon service made beyond the territorial jurisdiction "is not entitled "to recognition and enforcement in other States by force of the "Act of Congress and the Constitution of the United States," and that "it is only judgments that ensue from jurisdiction "regularly obtained over the parties by service of process upon "them or by voluntary appearance or when the proceeding is

'strictly *in rem* that carry with them these high sanctions, and "therefore are everywhere conclusive. *Jurisdiction in divorce "suits arising out of the status and domicile of one of the par-"ties cannot impart to a judgment any such efficiency."*

To the same effect are State v. Baker, 76 N. Y. 78; Jones v. Jones, 108 N. Y. 415; De Meli v. De Meli, 120 N. Y. 485; Matter of Kimball, 155 N. Y. 62; Colvin v. Reed, 55 Pa. St. 375; Reel v. Elder, 62 Pa. St. 308; Fyocks Estate, 135 Pa. St. 522; Irby v. Wilson, 1 Dev. & B. Eq. 568; Harris v. Harris, 155 N. Car. 587; McCreery v. Davis, 44 S. Car. 195; Cook v. Cook, 56 Wis. 195.

In England cases of divorce between parties having diverse domiciles have been rare owing to the tenacity with which English courts have held to the rule that the wife's domicile must follow that of her husband.

In Le Sueur v. Le Sueur, L. R. 1 Prob. Div. 139 (1876), however, Sir R. J. Phillimore was disposed to assume (though as he admitted going a step beyond previous authorities) that the wife had acquired a separate domicile in England, the husband having deserted her and gone to the United States, where citation was served upon him, but denied the divorce on the express and only ground that the husband not being domiciled in England was not subject to the jurisdiction.

If it should be urged that the decree of the Court of Chancery goes too far and denies to the plaintiff in error the benefit of his decree even within the State of North Dakota, the answer is that that is not a Federal question.

If the judgment or decree of the North Dakota Court is not entitled to full faith and credit everywhere by force of the Federal Constitution and Statute, then it is not one to which this Court can extend any aid whatever.

The jurisdiction of this Court on the present occasion is limited to considering whether the New Jersey Courts have acted contrary to the Constitution and Statute of the United States.

IV.

The North Dakota decree is void, because there is no statute of that State either pleaded or proved authorizing service of summons beyond the State.

It has never been alleged in the case from beginning to end that any such statute exists.

The only statutes of North Dakota anywhere referred to are those pleaded in the answer (Record, pages 28-29). These were the only ones offered in evidence (page 98).

This Court on error to the highest court of a State does not judicially notice the laws of other States.

Hanley v. Donohue, 116 U. S. 1.
Renaud v. Abbott, 116 U. S. 277.
Lloyd v. Matthews, 155 U. S. 222.

In Cheely v. Clayton, 110 U. S. 701, referring to a decree granted against a non-resident upon substituted service, the Court said: "But in order to make the divorce valid either in "the State in which it is granted or in another State, there "must, unless the defendant appeared in the suit, have been "such notice to her as the law of the first State required."

Where as in this case the record shows that the defendant was without the territorial limits of the State and that he never appeared in the action, presumption of jurisdiction over his person ceases, and the burthen is cast upon the party claiming under the decree to show that jurisdiction was acquired.

Galpin v. Page, 18 Wal. 350.
Kelley v. Kelley, 161 Mass. 111.

Nor does the finding that the service of summons and complaint out of the State was "as required by the laws of this State," or again, "as required by laws," supply the defect.

The statute must be set forth.

Holmes v. Broughton, 10 Wend. 75.
Kelley v. Kelley, 161 Mass. 111.
Salt Lake City Bank v. Hendrickson, 11 Vr. 52, 55.
Boehme v. Rall, 6 Dickinson (N. J.) 541, 545, 546.

It is therefore respectfully submitted that upon all the grounds above stated the decree of the Court of Errors and Appeals of the State of New Jersey should be in all things affirmed with costs.

ALAN H. STRONG,
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